



Montana Fish, Wildlife & Parks

Beaverhead and Big Hole River Recreation Rules

Environmental Assessment

DECISION NOTICE



Montana Fish, Wildlife and Parks (MFWP) conducted an Environmental Assessment (EA) on the predicted impacts of implementing proposed changes to the Beaverhead and Big Hole River Recreation Rules. This Decision Notice summarizes the proposed rule changes, identifies issues raised by the public, responds to public comments, and identifies MFWP's final decision.

June 16, 2005

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I. Introduction to the Decision Notice

At its December 16, 2004 meeting, the Montana Department of Fish, Wildlife & Parks Commission (“commission”) proposed amendments to the administrative rules governing recreational use on the Beaverhead and Big Hole rivers. Montana Department of Fish, Wildlife & Parks (“department”) prepared an Environmental Assessment (EA) on the predicted impacts of the proposed rule changes and identified three alternatives, including a preferred alternative. The public comment period for the proposed rule changes began on January 27, 2005 and concluded on March 7, 2005. The public comment period for the Environmental Assessment was February 15, 2005 to March 11, 2005. The commission made its final rulemaking decision on May 12, 2005 based on the recommendations of the Beaverhead/Big Hole Citizens Advisory Committee, public comments, and the department’s environmental assessment. This decision notice summarizes the proposed rule changes and the issues raised by the public. It includes the responses to the issues raised by the public, the commission’s final rulemaking decision, and the department’s final EA decision.

II. Proposed Action and Alternatives

A. Proposed Action

On December 16, 2004 the commission proposed changes to the administrative rules governing recreational use on the Beaverhead and Big Hole rivers (see Alternative B below). The commission proposed to:

- Eliminate May 1, 2005 sunset language;
- Review the rules within five years;
- Amend restrictions on float outfitting for specified reaches of each river;
- Create Temporary Client Days for One-boat Outfitters;
- Retain rules restricting nonresident float fishing on weekends for specified reaches of the Beaverhead and Big Hole rivers during the affected use period; and
- Retain the new outfitter moratorium and client day caps on the Beaverhead and Big Hole rivers.

B. Description of Alternatives

1. Alternative A: “No Action Alternative”

The commission would retain the rules that currently apply to the Beaverhead and Big Hole rivers (other than striking the language stating that the commission shall repeal or amend these rules on or before May 1, 2005).

2. Alternative B: “CAC Alternative”

The commission would amend the rules based on the recommendations of the Beaverhead and Big Hole Citizen Advisory Committee. The commission would amend restrictions on float outfitting for specified reaches of each river, create Temporary Client Days for One-boat Outfitters, retain rules restricting nonresident float fishing on weekends, and retain the new outfitter moratorium.

3. Alternative C: “Modified Alternative” (Preferred Alternative)

The commission would amend the rules the same as proposed in Alternative B with one exception: the commission would retain the prohibition on float outfitting for the Tash Bridge to Selway Bridge of the Beaverhead River.

4. Alternative D: “No Rules Alternative”

The commission would repeal the rules governing recreational use on the Beaverhead and Big Hole rivers.

C. Preferred Alternative

The department identified Alternative C as its preferred alternative.

III. Public Comments and Issues

A. Public Involvement Process

The public comment period for the proposed rule changes began on January 27, 2005 and concluded on March 7, 2005. The public comment period for the Environmental Assessment was February 15, 2005 to March 11, 2005. The department received written comments from 66 people and/or entities. The department conducted three public hearings (Bozeman, Butte, Dillon). Seven people attended the Bozeman hearing where two people testified. Approximately 60 people attended the Butte hearing where 11 people testified. Approximately 32 people attended the Dillon hearing where nine people testified.

In conjunction with this rulemaking, the department conducted an environmental assessment that also was a subject for public comment. The proposed administrative rules and the environmental assessment are two separate documents. However, people did not distinguish between the environmental assessment and administrative rules when submitting comments. The following comments, post cards, and petitions address the proposed administrative rules and the environmental assessment.

B. Postcards and Petitions

The department received 132 postcards signed by people supporting the following statement:

Yes! I have enjoyed the Big Hole and Beaverhead river recreation rules that regulate commercial use and protect resident angler opportunity. Please adopt the proposed rules that will slightly modify the existing recreation plans.

The department received 229 postcards signed by people supporting the following statement:

I petition the Montana Fish Wildlife and Parks Commission to reinstate the following section of the Beaverhead River Rules, "The river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to float outfitting." And I support Montana Resident's Day where there is not float fishing by nonresidents or float outfitting on designated sections of the river on designated days.

Additionally, the commission received a petition with 372 signatures. The petition stated:

We the undersigned petition the Montana Fish Wildlife and Parks Commission to reinstate the following section of the Beaverhead River Rules "The river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to float outfitting." We the undersigned support Montana Resident's Day where there is no float fishing by nonresidents or float outfitting on designated sections of the river on designated days and we support having the River Rules in effect year long, not just from the third Saturday in May through Labor Day.

C. Comments and Responses

1. General Comments on Outfitting Use

COMMENT 1: One person commented that current restrictions on outfitting are reasonable and effective. While client days have decreased in recent years, the downward trend is merely a reflection of the overall decline in angler days on the two rivers and is probably the result of prolonged drought conditions, poor stream flows, and shortened angling seasons.

RESPONSE: The department's environmental assessment noted that there are a number of factors that can influence the travel industry and a person's decision to recreate on the Beaverhead or Big Hole rivers. The rules could also influence use on the rivers. Some people might choose not to recreate on these rivers due to the presence of the rules. Other people might choose to recreate on these rivers because of the rules and improved conditions on the river.

COMMENT 2: One person recommended that when water flows reach a critical low all fishing and guiding should be immediately halted to ensure protection and survival of fish populations.

RESPONSE: The commission adopts emergency angling closures when conditions warrant such action.

COMMENT 3: One person commented that outfitters in this area use outfitters like the commenter because guides are very limited at this point in time because of the nonresident closures. Also, due to the low water, the season is short and therefore not profitable.

RESPONSE: Under the new rules an outfitter will still be allowed to serve as a guide for an authorized outfitter so long as the outfitter serving as a guide does not recruit clients, make agreements with clients concerning monetary considerations or services provided, or collect fees from clients (see response to comment 24).

Regarding the concern that nonresident closures limit guiding opportunities, the commission points out that the float outfitting restrictions apply equally to nonresidents and residents who are using the services of a guide. Therefore, the nonresident float fishing restriction only adds an additional restriction on nonresidents who are not using the services of a guide - the guided nonresidents are already regulated under the float outfitting restriction.

In regard to low water, the drought has affected everyone's recreational opportunities, including guided and nonguided sectors of use.

COMMENT 4: One person commented that he strongly supports the weekend ban on outfitter floats that is currently in place.

RESPONSE: Comment noted.

COMMENT 5: One person commented that the sections of the river closed to float outfitting are not warranted because nonguided users are not using these sections but are floating and fishing on the commercial sections.

RESPONSE: The rules do not require non-guided users to recreate on the sections closed to float outfitting and nothing prevents them from recreating on the sections open to float outfitting. The rules are designed to provide that type of experience for those who want it.

COMMENT 6: According to one person, the more restrictions that are placed on these two rivers the better. This individual commented that it is obvious that the overwhelming number of outfitters, guides, and other fishermen warrants restrictions.

RESPONSE: Comment noted.

2. Comments on Outfitter Moratorium

COMMENT 7: Some people expressed concern that the moratorium on outfitters is not letting new outfitters from this area come into business unless they find an outfitter that is going out of business and have enough money to buy their business.

RESPONSE: Together, the moratorium and the cap on client days define the maximum amount of outfitted use that is allowed on these two rivers. The moratorium is important for the reason that it sets an upper limit to the number of outfitters authorized to use the Beaverhead and Big Hole rivers. In the absence of a moratorium, the commission predicts that outfitters currently not authorized to use these rivers would do so in the future. Even if the cap on the overall number of client days was retained, the commission would have to determine a way to allocate client days to the incoming outfitters, which would likely be unpopular to those outfitters who are currently authorized to use the rivers and would stand to lose client days.

COMMENT 8: One person commented that the moratorium originally arose out of a social conflict. This individual firmly believes the social conflict has been resolved via the boat distribution and the distribution mechanism that has been in place through the current rules. He stated that the distribution mechanism is working very well and there is no need for the moratorium. He also commented that the moratorium has done nothing on the two rivers but create a permit that people are buying and selling on a daily basis these days. This person recommended that if there is going to be a moratorium, it should be implemented statewide to put everyone on an even playing field.

RESPONSE: If the moratorium was removed, the commission predicts that there would be an influx of new outfitters operating on the Beaverhead and Big Hole rivers. Although the float outfitting reach restrictions would curtail outfitted use on specified days and reaches, non-restricted reaches would experience greater use if the moratorium was repealed. Furthermore, there is a cap on client days and if the commission repealed the moratorium, it would also have to identify a mechanism for re-allocating some of the client days from existing outfitters to new outfitters, which could be contentious. A statewide moratorium on new outfitters would have to be coordinated with the Board of Outfitters. The commission is not prepared to implement a statewide moratorium at this time.

COMMENT 9: Some people voiced support for the outfitter moratorium. The Friends of the Beaverhead wrote that this organization supports the moratorium on outfitters and disagreed with the department's data for the Beaverhead River that estimated outfitter use was 10% of the total use. The organization commented that the majority of use on the Beaverhead River, from Sunday to Friday, on the reach from the Dam to Henneberry, is outfitted/guided. The organization also commented that there is not a verified number for the cap on outfitters, and that the outfitter data is poor to nonexistent. The organization commented that outfitters should be accountable for keeping complete and accurate records.

RESPONSE: The commission has retained the moratorium on new outfitters. The sources of information considered by the commission include the department's angling pressure estimates and the Board of Outfitters' outfitting records. Although the department's environmental assessment did not report the percentage of outfitted use on the Beaverhead River in 2003, it is assumed that the "10%" figure noted in the comment was derived from the data showing overall river use (26,968 angler days) and overall outfitted use for that particular year (2,462 client days), which indicates that reported outfitted use was just under 11% of the estimated total angling use. Based on surveys conducted on the river, the department estimated that outfitted

use on the Beaverhead was 55% in 1999, 34% in 2000, and 38% in 2002. It should be noted that this information comes from a different data set than the angling pressure estimates and the Board of Outfitters records.

The Board of Outfitters recently audited the records for use on the Beaverhead and Big Hole rivers from 1995 through 2000, the years that determined the client day cap. The audit resulted in a revised figure for the cap on both rivers. The department will continue to work with the Board of Outfitters on ways to ensure accurate reporting of use.

COMMENT 10: One person commented that the moratorium on new outfitters is a necessary element in the long-term protection of the river resources, and that if the moratorium were to be discontinued, the two rivers would likely see a large influx of new outfitters trying to establish their presence on the river. The result would be overcrowding and growing conflict between commercial and noncommercial anglers. Because of the rules, the last six years has seen a decrease in commercial/non-commercial conflicts, the result of the reasonable controls on the outfitters. Most of the affected outfitters and guides on the rivers support the current rules and reasonable limits.

RESPONSE: The decision to retain the moratorium on new outfitters was based in part on a concern that there would be an influx of new outfitters if the moratorium was lifted, and that the associated increase in use would likely lead to more social conflicts and impacts to the fishery.

3. Comments on Client Day Caps

COMMENT 11: One person commented that the number of permitted commercial float trips should be reduced, not increased.

RESPONSE: The commission decided not to change the total number of client days allocated to outfitters on the Beaverhead and Big Hole rivers. In ARM 12.11.207 and 12.11.212, the Beaverhead and Big Hole rules require the commission to evaluate the rules within five years and the commission can reassess the client day cap at that time.

COMMENT 12: One person commented that outfitters should be accountable for keeping complete and accurate records.

RESPONSE: The Montana Board of Outfitters maintains the records for fishing and hunting outfitters. The department has a cooperative relationship with the Board of Outfitters and the department has discussed record keeping with the Board's executive director. The department will continue to engage in this dialogue for the purpose of ensuring accurate records.

COMMENT 13: Some people commented that because of their association with fishing lodges, a few outfitters have the majority of the days on the Beaverhead River. They expressed concern that this is not fair to outfitters that have had operations on the river for many years and that it is not fair to the public.

RESPONSE: The commission is aware that some individuals were allocated a large number of client days due to their association with a lodge and its guests. The rules currently do not address this. Based on discussions with the public, it appears people disagree as to whether the allocation of client days to an outfitter due to their association with a lodge is contrary to what the rules were intended to accomplish in the first place. It appears that the greatest contention occurs when these outfitters don't use all the client days themselves and allow other outfitters to use them for a price. The response to Comment 24 addresses this issue.

COMMENT 14: One person commented that the original citizen advisory committees recommended that the department regulate range of operation (outfitted boats, rather than client days). This person explained that range of operation was based on an average of use consistent with management that is already in place on federal land (forest use permits). He pointed out that this recommendation was not adopted and instead the department adopted the historical use system that is in place today, which violated the original sideboards set by the commission and resulted in huge numbers of days allocated to certain individuals associated with a lodge. This person commented that in the original committees' work these huge spikes in use were not rewarded but averaged out, and that much of the "leasing" or "farming out of days" have come from the "gift days" created by the current rules.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters – see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers. Please refer to the response to Comment 24 regarding the selling or leasing of client days.

COMMENT 15: One person observed that some outfitters have more days than they can ever use but most of the outfitters have just barely enough days to get by. When they run out of days they have to go to other rivers and take their business out of the area. This person recommended that the commission get rid of the peak period or shorten it. He pointed out that the (actual) peak period on the Big Hole River is just two weeks during the Salmon Fly Hatch, which on the average happens from the second week in June to the fourth week in June. After that, the fishermen are following the salmon flies to other rivers.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters – see response to comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters, and the creation of

temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers.

COMMENT 16: One person wrote that by changing elements of the rule concerning caps businesses are affected much more than one realizes. This person wrote that if their cap is negatively affected, he is prepared to seek legal counsel and protest the additional restrictions. He commented that the commission couldn't average, change years, or change peak seasons without affecting someone in an adverse way thereby creating grounds for a lawsuit.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters – see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters, and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers. It should be noted that the allocated client days are not a property right, and an outfitter is not entitled to use of allocated days. The commission is authorized to make changes to the allocation system and the number of client days.

COMMENT 17: One person recommended that the commission/department establish two categories of outfitters:

Category One Outfitter:

- *Give every outfitter with the Beaverhead and Big Hole rivers on their operation plan a peak period use of 240 client days and the use of the unrestricted season for each river.

- *Each outfitter would be limited to four client days per day on a restricted river peak season.

- *The outfitter would have to be the primary guide with an additional guide boat allowed after that.

- *The outfitter and guide would have to operate on the same river but not necessarily on the same stretch.

- *In case of season ending injury, the outfitter could petition for an exemption to designate the outfitter boat as a guide.

Category Two Outfitter:

- *Based on the audited cap, outfitters that have in excess of 240 client use days per river would retain current operational use rights.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters – see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that the Beaverhead Big Hole Citizen Advisory Committee did not make any recommendations for changes to the allocation system other than the temporary client days for one-boat outfitters. The commission also noted that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers.

4. Comment on Proposal to Create Temporary Client Days

COMMENT 18: Some people raised concerns about the proposal to create temporary client days. One person observed that the temporary client days are contingent on an existing outfitter reporting zero use, which means his willingness to give up \$300. According to this person, \$300 is what a use-day is going for on the commercial market. This person wrote that he doesn't know too many people who are willing to give away money and commented that the rules would require a person to use just one client day to keep all of their days. He doesn't foresee one of those days becoming available.

Another person commented that as a small home-based outfitter in Dillon, he doesn't foresee that he would get one day out of the temporary client day system. This person said he has a handful of use days on the Beaverhead and Big Hole and would like to have more days to ensure a viable business. Under the system proposed here, this person commented that he would not get enough days to have a viable business and that people like him that are small, home-based independent outfitters can't have a viable business unless they spend \$40,000. This person commented that he is going to go out of business, go into a different industry, or throw in with the large operations. He foresees that down the road in five years if these rules are still in place, there will be five outfitters on the Beaverhead and Big Hole running all the trips.

One commenter wrote that the idea of restricting an outfitter to "one boat" severely limits his marketing opportunities and limits the potential growth and success of his business. This person noted that it is unclear at this time whether or not a "one boat" outfitter would be allowed to operate more than one boat on unrestricted rivers, or if the outfitter would have to be a one-boat outfitter on all rivers in the state. If the latter is the case, he questioned whether it is legal to adopt rules for the Beaverhead and Big Hole that would affect an outfitter's use of other rivers in the state.

Another person wrote that the drop in outfitted use on these rivers shows there might be some wiggle room for a one-boat outfitter to come in underneath these caps. He commented that the system that has been proposed would only provide enough use for one outfitter, and because you would only be able to apply for up to 60 client days, only two new people could realistically get in. He commented that this system would not serve their purpose and unfortunately that means

he has to support Alternative D, which distresses him because he loves many of the things that the outfitting industry and the resident people have come to support.

RESPONSE: The commission decided to adopt the rules creating temporary client days for one-boat outfitters. The commission made some changes to the rules based on public comments and additional analysis by the department. The rules clarify that a "one-boat outfitter" means an outfitter who operates no more than one boat on the Beaverhead River, or an outfitter who operates no more than one boat on the Big Hole River. In either case the outfitter is the sole guide. The rules allow a one-boat outfitter on the Beaverhead or Big Hole to operate more than one boat on other rivers in the state. This provision addressed the concern that requiring an outfitter to operate one boat on all rivers in the state would severely limit their ability to conduct a viable business. The statewide river recreation rules (see, ARM Title 12, Chapter 11, Subchapter 4) state that management processes should encourage viable and diverse types of commercial services. Outfitters operating more than one boat on other rivers in the state would, however, only be allowed to operate one boat on the Beaverhead or Big Hole and they would have to serve as the guide.

The commission anticipates that there will be some temporary client days created over time due to lapsed licenses, deceased outfitters, and outfitters reporting zero use for two consecutive years. Additionally, after three years of using temporary client days, the following year one-boat outfitters can only apply for the highest number of days they actually used during the first three years. The remainder of the days would go back into the temporary client day pool. The temporary client day system might not produce a large number of days but it should provide some opportunities for small outfitters who are unable to purchase another outfitter's business, which was the intention of the Citizen's Advisory Committee (CAC) when it recommended this system.

Regarding the sale of use days, the new rules clarify that renting, selling, or leasing of use days is prohibited. (See, response to comment 24.)

COMMENT 19: One person wrote that when the Beaverhead and Big Hole rules were initially put in place, part of the reason was to put a moratorium on pressure on these rivers. This individual commented that it appears now that the proposed temporary use days are intended to keep commercial use at a maximum amount.

RESPONSE: The temporary client day system is intended to provide an opportunity for small outfitters who are unable to purchase another outfitter's business. The commission anticipates that the number of temporary client days will be small compared to the overall number of client days allocated to outfitters. The amount of use generated by one-boat outfitters should not have a significant impact on other users.

COMMENT 20: The Fishing Outfitters Association of Montana (FOAM) and some individuals recommended that all outfitters currently operating on the Beaverhead and Big Hole rivers should be allowed to participate in the use of temporary client days. FOAM commented that the definition of 'one-boat outfitter' was intended to satisfy a single interest, that of smaller, typically single-craft outfitters, and that this definition is unfair to those other outfitters with slightly or

considerably larger operations who could also benefit from additional temporary client days on these rivers. They recommended that if the idea was to create temporary days for an outfitter who, because of his or her small operation, would be the person at the oars for these temporary days:

- (1) All outfitters under the current moratorium be allowed to apply for temporary days
- (2) That any outfitter granted temporary days **MUST** row the craft and/or guide the clients for those days
- (3) No other outfitter or guide may use these granted temporary days until the days have been allocated to the original successful recipient outfitter according to New Rule I (12.11.206).

Another person recommended that if there are temporary client days issued, they need to be issued to outfitters that are presently authorized to operate on the Big Hole and Beaverhead Rivers. This person believes that allowing outfitters who are not currently authorized to operate on these rivers is going to create conflict in the future and more pressure for more temporary client days. Another person commented that the proposal to create temporary client days eliminates any possibility of regulating the number of fishing guides and the number of guided boats used on the Big Hole River, and that this is an irresponsible proposal because at present there are more fishing guides on the Big Hole River than at any time in the past.

RESPONSE: The temporary client day system was an attempt by the CAC to create opportunities for small-sized outfitting businesses that are unable to purchase another outfitter's business in its entirety. The temporary client days are available to authorized outfitters on the Beaverhead and Big Hole so long as they meet the definition of a one-boat outfitter. Authorized outfitters who do not meet the definition of a one-boat outfitter still have the option to purchase another authorized outfitter's business in its entirety and assume use of the transferred client days. A critical component of this system is that the outfitter must not operate more than one boat on the river, and the outfitter must serve as the guide. The fact that the rules require the one-boat outfitter to serve as the guide should eliminate concerns that another outfitter or guide would be able to use the temporary client days. The rules say that "zero use outfitters" and "lapsed license outfitters" will forfeit their days and will no longer be authorized to conduct use on the river. The department estimates that the number of one-boat outfitters using temporary client days will be less than the number of outfitters that forfeited their days, which should alleviate some concerns about more outfitters operating on the rivers and creating additional conflicts.

COMMENT 21: The Montana Wildlife Federation commented that it was unsure that the temporary client provision would significantly increase commercial outfitting use of the Beaverhead and Big Hole because of the stipulation that total use shall not exceed the cap originally set in the biennial rule process. Considering that Montana's seven-year drought has added stress factors to the resource, the organization requested that the cap number be reevaluated. The organization does not object to outfitter services on Montana's rivers if they are offered in such a way that does not detract from or inhibit the ability of other members of the public to enjoy the resources. Furthermore, such outfitted use must include sideboards to assure the public that a vested right in those outfitter days has not been created and that those outfitters

will not be brokers for the normal use of these public rivers. This organization also requested that cap numbers be reviewed to assure the public that the resource is not being compromised.

RESPONSE: The commission anticipates that the number of temporary client days will be small compared to the overall number of client days allocated to outfitters. The amount of use generated by one-boat outfitters should not have a significant impact on other users. The allocation of temporary client days does not establish a property right. The commission can choose to remove, eliminate, or change the number of temporary client days at any time. Furthermore, the temporary client days cannot be sold or leased to another outfitter or guide. Please refer to the response to comment 24 regarding the selling or leasing of client days. As for the overall client day cap, the commission decided not to change the overall client day cap at this time. In ARM 12.11.207 and 12.11.212, the Beaverhead and Big Hole rules require the commission to evaluate the rules within five years and the commission can reassess the cap at that time.

COMMENT 22: Some people supported the proposal to create temporary client days for one-boat outfitters. The Skyline Sportsmen noted that its members cautiously support the proposal to allow new single-boat outfitters to enter the outfitting pool on both rivers. However, they asked that this proposal be adopted only if there is no net increase in client days.

RESPONSE: The temporary client days will be derived from existing client days and therefore there could not be an increase in the overall number of client days allocated.

COMMENT 23: One person wrote that the addition of provisions to allow new single-boat outfitters would allow "new blood" to enter the profession and keep the industry fresh, while maintaining no net increase in client days. One person commented that he is in favor of allowing one-boat outfitters to acquire day use on the Beaverhead and Big Hole rivers, and that all fishermen should be allowed the use of the entire river to help spread out use. One person commented that the option to let the one-boat outfitters acquire day use is very important.

RESPONSE: The commission viewed the temporary client day system as a way to allow some opportunities for small-sized outfitting businesses without having a negative impact on the general public.

5. Comments on the Selling or Leasing of Client Days

COMMENT 24: Some people expressed concern that some authorized outfitters are charging other outfitters or guides a fee for the opportunity to conduct use using the authorized outfitters' client days. Their concern is that some outfitters on the Beaverhead or Big Hole have excess client days and rather than hiring or contracting a guide or an outfitter serving as a guide, they sell or lease these days to other outfitters or guides and the outfitter with the allocated use has no connection to the clients. Some people commented that this practice is illegal and that it violates the original intention of the Beaverhead and Big Hole rules. The concern is that these unauthorized outfitters book the clients and then lease client days from an authorized outfitter.

RESPONSE: The original rule allocated client days to outfitters with historical use and the intention was that the authorized outfitters or their guides would use the days. The intention was not to allow the authorized outfitters to "broker" the days to other outfitters or guides for a profit. With that in mind, the commission decided to add additional language to the rules that would further clarify that an outfitter may not sell, lease, rent, or otherwise receive compensation from an outfitter or guide for the opportunity to use client days. This language does not prevent the transfer of river use days on a restricted use river when a fishing outfitter transfers their business in its entirety. The commission also points out that the use of client days is a privilege and not a property right that can be sold.

6. Comments on Nonresident Restrictions

COMMENT 25: Some people expressed opposition to retaining the restrictions on nonresident float fishing. The Federation of Fly Fishers commented that it believes the proposed changes as written are discriminatory to nonresident anglers and based on questionable conclusions. The organization questioned the 1999 determination of nonresidents as the primary contributor to overcrowding on the rivers, and requests that the data and process used to make this determination be made clearly available to the public.

RESPONSE: The commission's decision to retain the restrictions on nonresident float fishing was based on the department's environmental assessment, angling pressure estimates, the user surveys conducted by the department in 1999, 2000, and 2002, and public comments. The commission also consulted the statewide river recreation rules. All of the data considered by the department and the commission during the rulemaking process is referenced in the draft environmental assessment. After careful consideration, the commission concluded that nonresidents are a primary contributor to social conflicts on both the Beaverhead and Big Hole rivers and nonresident float restrictions on Saturdays and Sundays on a very short section of the river are a reasonable method for addressing this concern.

The rule notice released in January of 2005 states, "The amount of use by nonresidents at that time (pre-2001) was considered a primary contributor to the crowding problem (on the Big Hole)." Arguably, this statement is somewhat confusing because the commission in 2001 did not use the words "primary contributor." The commission's intent, however, was to address a nonresident crowding problem that warranted restrictions. An improvement on the statement in the rule notice would be to say that the commission at that time concluded that the amount of nonresident use warranted restrictions.

COMMENT 26: One person asked if there is a specific threshold of angler days that constitutes overcrowding, and if there is a specific percentage at which nonresidents become a "primary contributor" to overcrowding. This person commented that on the Big Hole River, the percentages of users are generally less than 50% nonresidents. Another person wrote that the statewide river recreation rules say nonresidents should receive equal consideration.

RESPONSE: The amount of nonresident use on the Big Hole River has varied over time. Some people have argued that nonresident use has always been less than resident use, and therefore they question how the commission could conclude that nonresidents are a primary contributor to the crowding problem (in 2003 the department estimated there were 28,171 nonresident angler days and 29,114 resident angler days). The commission points out that a sector of use does not have to be the majority of use in order to be a primary contributor to a crowding problem. Furthermore, the commission considered other important aspects of the statewide rules when making its decision.

The statewide rules say, "Planning and management of Montana's river systems should provide for and conserve a full variety of recreation experiences and assure that river recreation historically enjoyed by people in Montana is recognized." The statewide rules also say, "Nonresidents should have reasonable and equitable opportunities compared to other recreational users to enjoy Montana's resources, and that 'Reasonable and equitable' as applied to nonresidents means recreational use that fairly considers the interests of all types of recreational users, and is not intended to mean that each type of recreational user must have the exact same share of use in terms of the timing, amount, and location of use."

COMMENT 27: The Fishing Outfitter's Association of Montana commented that the data regarding nonresident use on the Big Hole River does not demonstrate their primary contribution to an identified problem. The organization commented that neither the CAC nor the department has asserted that there are emergency biological conditions or issues of public safety that warrant restrictions on nonresident float angling alone. ARM 12.11.420(4). The organization commented that absent best-available data or emergency biological conditions to the contrary, only the "value-driven" considerations of the new administrative rules for river recreation management remain as the basis for continued restrictions.

RESPONSE: The commission considered the best available information and concluded that nonresident use on the Big Hole River is a primary contributor to crowding. The commission noted that a sector of use could be less than fifty percent of overall use and still be a primary contributor to a problem, which was the situation on the Big Hole River (see response to comment 26). The commission also considered other important elements of the statewide river recreation rules (see response to comment 26).

The commission also concluded that float fishing contributes more to social conflicts than other types of river recreation on the Beaverhead and Big Hole rivers. Therefore, the commission decided to retain a rule restricting nonresident float fishing, as opposed to a broader restriction on nonresident use of the river. Furthermore, the commission concluded that because the restriction applies only to nonresident float fishing two days per week on short, specified reaches of each river, nonresidents still have reasonable and equitable opportunities to recreate on these two rivers. The commission concluded that nonresident float restrictions are an effective way to moderately regulate nonresident use and ensure that it does not rise to a level that would warrant additional restrictions.

COMMENT 28: The Fishing Outfitter's Association of Montana commented that the environmental assessment could not address the repeal of nonresident float-angling restrictions as a single issue. The organization wrote that the environmental assessment states the department's prediction that, with Alternative D, "in the absence of any rules, the nonresident fishing use would increase on the Big Hole river, particularly in the reaches of the river where there are currently nonresident float restrictions." The organization commented that prior department summer surveys have shown that nonresident float angling in these stretches was never a majority-of-use issue in the first place; there is no reason to expect it would be in the future. Consequently, this organization does not believe that repealing this single restriction would have any impact on the fishery. The organization also commented that since there is no clear correlation between nonresident proportion of use and increased total use, much less between nonresident float angling and overall use, only future data will identify a problem and its "primary contributor." Until that data is available, the organization recommended that no restrictions should be levied on nonresident float anglers. The organization commented that proposed language allows for review of these rules within five years of their adoption, and if sufficient data exists suggesting any particular user group is a primary contributor to an identified problem, appropriate measures could be applied at the time of that review.

RESPONSE: The department does not have data on the number of nonresidents float fishing on the Big Hole River. The angling pressure surveys estimate overall nonresident angling use on the river. The user surveys conducted in 1999, 2000, and 2002 estimate the proportion of use on the river. It was the overall amount of use that factored into the decision to retain the nonresident float restrictions. If the rules were repealed altogether (Alternative D), the department predicted that there would be an increase in use on the Big Hole River, and the additional angling pressure would negatively impact the quality of the experience and could have significant impacts on the drought-stressed fishery. There would probably be less of an impact to the fishery if the commission eliminated the nonresident float fishing restrictions and retained the rest of the rules. There would, however, be a greater likelihood that boat traffic would increase on the Big Hole River if the nonresident float restriction was eliminated. Boat congestion is one of the single biggest reasons for the rules in the first place, and the presence of more boats on the water could incite more social conflicts and lead to more restrictive measures being taken. Ultimately, the commission considered all of the variables and concluded that nonresident float restrictions are warranted and are a reasonable and effective way to moderately regulate nonresident use and ensure that it does not rise to a level that would warrant additional restrictions.

COMMENT 29: One person commented that current rules have set aside sections of the rivers for the exclusive use of resident anglers and noncommercial users, which is not consistent with the statewide rules.

RESPONSE: The Beaverhead and Big Hole rules do not set aside a section of either river for the exclusive use of non-guided, resident anglers. Outfitters and their clients can still wade the restricted sections of the river or go to sections where there are no restrictions in effect. Furthermore, nonresidents are not prohibited from wading the river on days when nonresident float restrictions are in effect.

COMMENT 30: One person wrote that the establishment of an exclusive use section for resident anglers should have encouraged residents to use those sections, thus showing an increase in resident angler numbers. According to this person, that did not happen. Instead, resident angler numbers declined over the past four years of the current rules.

RESPONSE: Resident use declined on both rivers in 2001 and increased in 2003. The rules are only one of a number of variables that can influence a person's decision to recreate on the Beaverhead and Big Hole rivers, including drought, low flows, fires, and the economy.

COMMENT 31: One person wants to know when a nonresident relative comes to Montana, why the people who live here can't take them on the restricted sections of the river. Instead they have to float where the outfitters float.

RESPONSE: The rules do not distinguish between nonresidents who have relatives in Montana and nonresidents who do not have relatives in Montana. The rules do, however, allow nonresidents to wade any section of the river at all times. The nonresident float restrictions only apply to a small percentage of the overall angling opportunities.

COMMENT 32: FOAM commented that if, as suggested in the CAC's charter, the group was to "evaluate the effectiveness" of the Beaverhead and Big Hole river recreation rules, the citizens spent little or no time evaluating the effectiveness of current weekend restrictions on nonresident float angling on the Big Hole. Nor did the committee discuss whether these current restrictions are consistent with the statewide river recreation rules, and they failed to develop recommendations that reflected the interests of the nonresident public that is affected by river recreation management decisions on the Big Hole.

RESPONSE: The CAC considered all elements of the rules when making its recommendations to the commission. The committee members spent more time on elements of the rules that they believed needed changing, and less time on elements of the rules that they believed should stay the same. The department advised the committee of its charter but the department did not dictate to the committee how to conduct its assignment. The committee also made a conscious choice to complete its recommendations prior to the commission's rulemaking process, which in turn determined the amount of time the committee had to do its work.

COMMENT 33: Some people expressed support for retaining the nonresident float restrictions. One person commented that he strongly supports Resident's Day on reaches of the rivers on Saturdays and Sundays and pointed out that the 2003 department pressure data on the Beaverhead River estimated nonresident use to be 73%. He also commented that in 2001, nonresident use was 70%, and that this data supports the need for Resident's Day on the river and the preferred alternative.

RESPONSE: The commission took into account the department's user surveys that estimated proportion of use when adopting these rules.

COMMENT 34: One person wrote that the data from the 2002 Angler Satisfaction surveys contradicts claims by outfitters and some businesses that nonresidents object to limitations

placed on them. This person pointed out that more than half the nonresidents surveyed expressed positive reflections of the experience despite commercial assertions to the contrary.

RESPONSE: The commission took into account the 2002 Angler Satisfaction survey and noted the overall public satisfaction with the rules.

COMMENT 35: One person said it is important to note that while total use has declined on the Big Hole River due to the ongoing drought conditions, the proportion of nonresident to resident anglers has remained relatively constant. For example, in 1997 nonresident anglers accounted for 47% of total use on the Big Hole River. In 2003, nonresident anglers accounted for 50% of total use. According to this person, arguments that the rules have displaced nonresidents are simply not supported by the data provided in the environmental assessment. One organization commented that if there is a limiting factor for resident and nonresident anglers alike, it is stream flow, and not river recreation regulations. This organization went on to say that when drought conditions depress stream flow, angler use declines as conditions worsen and flow drops. This organization has every expectation that nonresident angler days will approach record levels once normal stream flow patterns return.

RESPONSE: The estimates on proportion of use aid in understanding the composition of the use occurring on the rivers. This information also helps to predict trends in use in the future. If the proportion of use stays relatively stable and data indicates that overall use is on the rise, it is possible to make some general predictions on future trends in use by individual sectors. For example, if the proportion of use remains fairly stable and overall use declines under drought conditions, it is possible to predict that when drought conditions subside and overall use increases, the proportion of use will still be similar.

COMMENT 36: One person commented that resident anglers are the individuals that work to conserve and protect these streams, and that the commission must provide reasonable rules to control the growth in nonresident angler days, and maintain the resident anglers' connection with this resource.

RESPONSE: The commission consulted the statewide river recreation rules and its guiding principles when considering resident and nonresident interests.

7. Comments on Economic Impacts

COMMENT 37: Some people commented on the economic/financial aspects of the rules. One person commented that the rules would decrease the value of their business, making it difficult for resale. According to this person, one of the biggest questions is how the rules affect a person's business. If these rules continue, this person said he would probably have to close his business in a couple of years.

RESPONSE: The statewide rules say that, "River service providers are an important industry in Montana and should be regulated." The statewide rules also say, "Management processes should encourage viable and diverse types of commercial services." The Beaverhead and Big Hole rules

provide opportunities for the public to hire the services of a guide, and the rules are designed to maintain outfitting services on these two rivers. Due to the number of factors that influence the outfitting industry, it is impossible for the commission to guarantee that every single outfitter will have all of his or her interests provided for.

COMMENT 38: One person commented that a lot of conservation groups say that the reason the business is down is because of the drought and stock market. This person stated that this is a factor but not the sole reason. According to this person, fishermen don't want to come to the Big Hole and Beaverhead rivers and have to fight the regulations when they can go to the Madison and Missouri and not have these problems. One organization commented that it is their belief that there was an extensive decline in angling-based tourism specific to our area, especially in the time just after the rules were implemented. This person thought that the primary reason for the decline was due to the publicity surrounding the rules and not due to other circumstances including: the smoke and fires the previous year, the drought, national economic conditions, and security concerns.

RESPONSE: The number of variables influencing a person's decision to recreate on the Beaverhead or Big Hole rivers is extensive. The commission did not rule out the possibility that the rules have influenced people's choices, but it also did not conclude that the rules are the sole or overriding factor in a person's decision.

COMMENT 39: One person commented that he considered the net economic value of fishing in Montana according to department data and looked at some of the angler use numbers over the years. He used this information to quantify what the combined Beaverhead and Big Hole economic value would be. According to this person, in 1997, the Beaverhead and Big Hole combined would be worth 15 million dollars, in 1999 it would be worth 13 million dollars, in 2001 it would be worth 6.6 million dollars, and in 2003 it would be worth 10.9 million dollars.

RESPONSE: The tourism industry, including outfitting, is important to the state's economy. Likewise, river recreation on the Beaverhead and Big Hole rivers by residents and nonresidents is important to the economy of southwest Montana. Its importance was one of the factors considered in the rulemaking process.

8. Comments on the Beaverhead and Big Hole CAC

COMMENT 40: Some people provided comments on the Beaverhead and Big Hole CAC. One person commented that Montana residents were not fairly represented on the Citizens Advisory Committee, for the Beaverhead River. Another person wrote that nonresident interest representation/participation in river recreation management decisions (work of the CAC) was insufficient. This person also expressed concern that the timeline and administrative budget provided by the department made it nearly impossible to apply ARM 12.11.430, "River Recreation Management Plans and Rules: CAC Responsibilities," specifically (2)(b) – (2)(g) regarding specific analysis and identification of conditions that may warrant restrictions. This person commented that since nonresidents are affected by these recommendations and no time

was spent considering the above rules when developing recommendations for the new five-year rules, nonresident interests were sidelined.

RESPONSE: The commission believes that the CAC fairly represented the interests of those affected by river recreation management decisions on the Beaverhead and Big Hole rivers, including the interests of residents, nonresidents, outfitters, landowners, business owners, anglers and non-anglers. In a CAC process, the appointment of committee members is a critical step in determining the credibility of the committee's recommendations. The department put considerable effort into appointing a committee and sought representation for both rivers and a mixture of people who served on previous advisory committees and people who would bring a fresh look to the process. Lastly, the department and the facilitator made it clear at the onset of the process that it was the responsibility of the committee members to also recognize the interests of those people not sitting at the table.

COMMENT 41: FOAM commented that the CAC selection did not include a nonresident, and that instead the committee relied on outfitter members and one member to represent nonresident interests. According to this organization, the forced dual-duty and multiple interests of the various outfitters specific to their representation (industry-wide concerns, individual businesses, previous participation in recreational rulemaking, etc.) took precedence over nonresident interests, and that nonresident issues were not sufficiently pursued within the CAC process, as admitted by the outfitters and other committee members to Commissioner Mulligan, both at the time and since they disbanded. This organization commented that nonresident interests should be considered before any management rules are adopted or re-adopted, particularly one which restricts their activity, in light of their shared preference to recreate on rivers without controls on their recreational experience.

RESPONSE: This comment illustrates that despite the department's best efforts to appoint a committee that fairly represents the interests of the public, it is not uncommon to hear from some people who are critical of the composition of an advisory committee. It is the commission's perspective that criticism sometimes arises after a committee has completed its work, and those people dissatisfied with the end product are quick to find fault with the committee itself. As stated previously, the department put considerable effort into appointing a committee that could fairly represent the interests of anglers and non-anglers, residents and nonresidents, guided and non-guided, landowners, and tourism. The department also sought representation for both rivers and a mixture of people who served on previous advisory committees and people who would bring a fresh look to the process. Lastly, the department and the facilitator made it clear at the onset of the process that it was the responsibility of the committee members to also recognize the interests of those people not sitting at the table.

Specific to the concern that the advisory committee did not include a nonresident, the commission points out that the department publicized on its website and via press releases that it was seeking people to serve on the committee. There were no nonresidents that applied to serve on the committee. Similar to the statewide River Recreation Advisory Council, the Beaverhead and Big Hole CAC members were asked to represent the interests of all those who recreate on the river, including nonresidents. No member of the CAC voiced a concern that the nonresident interests were not fairly represented or sufficiently pursued during the tenure of the committee.

COMMENT 42: One person commented that the CAC wasn't given enough time to do a thorough investigation of the whole biennial rule, and there are still many questions that, when asked, they do not have an answer for, or they are unaware of the problem that might exist.

RESPONSE: At the CAC's first meeting the department explained the rulemaking timeline, including the language in the current rules that states that the commission shall repeal or amend the rules on or before May 1, 2005. The department also explained that if the CAC was unable to complete its assignment in time for the commission to make a rule decision on or before May 1, 2005, the commission could choose to continue the existing rules until the committee completed its work. The committee chose to pursue its assignment aggressively in order to submit its recommendations to the commission before it had to make a decision.

As for the concern that committee members did not have an answer for some problems, or that the committee members were unaware of some of the problems, the department presented information packets to the committee members to help them evaluate the rules and address common problems. A citizen advisory committee cannot be expected to have all the answers to every problem or situation that arises but the department attempt to prepare them as best as possible for their assignment.

COMMENT 43: The Beaverhead and Big Hole Outfitter and Guide Association (BBHOGA) and the Montana Outfitter and Guide Association both commented that the environmental assessment and the preferred alternative are counter to the recommendations of the Beaverhead and Big Hole Citizens Advisory Committee and that the committee's recommendations are better than the alternative provided by the department.

RESPONSE: The commission tried to adhere to the CAC's recommendations as much as possible. The commission also based its decision on the public comments and the department's environmental analysis. The final rulemaking decisions rest with the commission.

9. Comments on Enforcement

COMMENT 44: One person commented on the enforcement of the river rules. He asked if the department is monitoring the guides on the day they should not be on a stretch of the river. He also commented that outfitter boats are supposed to be tagged or marked, and he has never witnessed a checkpoint regarding this rule.

RESPONSE: Outfitters and guides authorized to conduct use on the Beaverhead and/or Big Hole rivers are required to display a tag on their boat that signifies that they are authorized. The department's enforcement division does check for compliance with all aspects of the rules. In 2004, for example, the department estimates that it checked 132 outfitters or guides on the Beaverhead and 94 outfitters or guides on the Big Hole.

10. Comments on Data

COMMENT 45: Some people commented on river recreation data. One person commented that most or all of the river use statistics numbers given to the public by the department in the environmental assessment are inaccurate. He commented that as an example, during the survey years on both rivers a surveyor was placed at random boat ramps during pre-set time periods. Based on his own personal experience, there were more days when not surveyed than days he was surveyed. This person does not think this was the fault of the surveyor, nor did this person attempt to avoid them. Instead this person thinks they simply missed each other. According to this person, the surveyor was not able to survey everyone getting off the river at some sites at key times (e.g., 5 – 6 p.m. when outfitters are getting off the river in order to get their clients home at a specified time). This person commented that he was using these examples only to illustrate his point that the numbers are inaccurate and inadequate for the purpose of fairly assessing and managing this conflict.

RESPONSE: There are staff members within the department who have expertise in designing surveys and conducting statistical analyses. The department strives to conduct objective, accurate, and informative surveys, and the department believes the surveys on the Beaverhead and the Big Hole rivers met this objective.

COMMENT 46: One person wrote that the two survey methods used to collect data on anglers and users are not directly comparable due to the differences in survey methods. This individual commented that the user surveys used to determine percentage of nonresidents included all river users, not just anglers, and therefore the restrictions on anglers might not be fully justified.

RESPONSE: The department's environmental assessment explains that there were two survey instruments referenced in the document. The commission considered all of the data when making its decision.

COMMENT 47: One person wrote that based on the data available, particularly for the Big Hole River, angling pressure trends are unclear and variable.

RESPONSE: The angling pressure data shows use on the Big Hole peaked in 1997, decreased in 1999 and 2001, then increased in 2003 (four data points). No matter how much data is available, there is always the possibility that someone will argue that the data is unclear or variable. The department and the commission will continue to monitor use over time and make decisions based on the best available data.

COMMENT 48: One person recommended that the department create a restricted river floaters license that would be purchased in addition to a fishing license. This person recommended that the license operate in the following way:

- (1) A resident and non-resident floater would pay a separate rate. A non-fishing float license would be free.
- (2) Require floaters to sign in at a boat ramp collection box and retain a stub for proof.

- (3) Collect user data such as date, time, put in, take out, Automated Licensing System number, guided, nonguided, outfitter's license number, guide's license number, etc.
- (4) Once you can establish specific information on a user group, you can manage growth of resident and nonresident floaters through fee increases.

RESPONSE: The commission asked the department to consider this recommendation in the future when discussing methods for collecting data. Collecting data can be expensive, and the department does not currently have the funds to implement all of the requests for information. As for managing growth of resident and nonresident floaters through fee increases, the commission does not want to use fees as a way of discouraging people from recreating on rivers.

COMMENT 49: One person recommended that the department put sign-in boxes at all the access sites and make it a requirement that individuals floating the river sign in. That way people could look to see how many people are floating the river ahead of them.

RESPONSE: This method is already used at some Block Management sites and can be an effective way to inform the public on conditions the public might encounter. The department does not have the funds at this time to install and maintain sign-in boxes on the Beaverhead and Big Hole rivers but this suggestion could be considered if resources become available.

COMMENT 50: One person commented that the department should keep good statistics on use changes to see how effective the rules have been.

RESPONSE: The department has conducted four surveys specific to the Beaverhead and Big Hole rivers since the rules were first adopted in 1999. The department's angling pressure survey also provides information on the amount of angling occurring on these two rivers. The department's ability to collect additional survey data specific to these rivers is contingent upon the availability of funding for this purpose. The department does not have the resources at this time to initiate any new surveys.

COMMENT 51: One person was confused about graphs one and two in the environmental assessment. He thought the same data set was used in both graphs. If this was so, there was a 20% margin of error in graph 2.

RESPONSE: Graphs one and two in the environmental assessment were derived from two data sets, the angling pressure estimates and the user surveys. The environmental assessment explains the difference between the two data sets, and the graphs are clearly labeled.

11. Comments on the Need for a Management Plan

COMMENT 52: One person commented it is in everybody's best interest to create a lasting framework for use management. This person believes alternatives A-D fall short of a comprehensive management plan.

RESPONSE: The commission and the department are also interested in establishing a lasting framework for use management and are hopeful that the commission's decisions will meet this objective.

12. Comments on Launch Restrictions

COMMENT 53: Some people commented on the launch restrictions. One person observed that the two boats per launch restriction not only applies to commercial but to private use as well. They commented that the private sector is not complying with the law and that they have seen a lot of times that noncommercial floaters have put in more than 2 boats per landing.

RESPONSE: The commission shall pass this information to the department's enforcement division.

COMMENT 54: Some people provided suggestions for regulating float parties. One person recommended a change to ARM 12.11.210 Big Hole River Use Restrictions. He would like this to say "all float parties", not just users. He recommended that the commission define parties as a group of users, and that then it would apply to everyone on the river. So basically, a group would be two boats going down the river. One organization recommended that the department slightly adjust the language in the section dealing with the limit on two-boat launches per access point per day. The organization pointed out that this language was initially intended to limit the size of parties to two boats. Under the current language, a party can launch any number of boats, but each individual user is limited to two launches. The organization commented that this does nothing to control party size and it urged the commission to change the language to say a "floating party is limited to two boat launches per day plus each outfitter would be limited to two launches per access point per day as would private parties."

RESPONSE: The rules say that all float users, including each float outfitter, are limited to a total of two launches at or near each official access site per day on the Big Hole River. The rule is aimed at restricting launches in an effort to regulate the number of watercraft using a particular reach of the river. The rule does not, however, affect the size of a group or party once people are on the water. People can comply with the restriction on launches and still join together in one group once they are floating down the river. It is the commission's understanding that some people object to the occurrence of large groups of people and boats on the river. From an enforcement perspective, it would be difficult to apply the launch restriction to parties and enforce a rule that prohibits people from joining together once they have departed from the launch site. The commission points out that it recently adopted a special recreation permit program on the Blackfoot River and that program identifies maximum group size guidelines for commercial use, competitive events, and organized group activities. The permittees are required to register with the department. Management of group sizes can be an effective tool to prevent conflicts on the water. The commission plans to monitor the effectiveness of the Blackfoot River special recreation permit program. It might be of value in the future to require large groups on the Big Hole River to register with the department. The Blackfoot River should provide the commission insight on how best to accomplish this.

13. General Comments

COMMENT 55: Some people provided general comments on the river rules. One person recommended that the commission should somehow put a mandated control on float numbers and limit the out-of-state outfitters on certain river systems such as the Beaverhead, Big Hole and Ruby rivers.

RESPONSE: Comment noted.

COMMENT 56: Some people noted that the Beaverhead and Big Hole rules survived challenges from FOAM and BBHOGA, challenges in the legislature, and the rules have been before the Environmental Quality Council, and in the courts. They observed that throughout all the challenges the rules have been upheld, and this should be significant to the commission in determining which alternative is chosen.

RESPONSE: Comment noted.

COMMENT 57: One person wrote that he strongly believes that the department must license outfitters and guides. This person stated that it is very hard to regulate outfitter and guide use when the department has no control over who is licensed and the number of licenses that are issued.

RESPONSE: The legislature would have to make this type of change.

COMMENT 58: One person asked the commission, "Would we have the current rules in place had the original CAC had the statewide rules as a guideline?" This person thought the answer would be "no".

RESPONSE: Comment noted.

COMMENT 59: One person commented that river use has decreased in recent years, especially 2001 and 2002, but to claim that the implementation of the rules has caused the decline would be a gross oversimplification. This individual noted that rivers on other parts of Montana such as the Ruby, the Blackfoot and Big Horn Rivers, which lack similar restrictions, have also seen a decline in use in 2002. He commented that factors such as the profound drought, a sluggish economy, high gas prices, and a change of attitude since September 11, 2001. This individual stated that there is little evidence to imply a cause and effect relationship that has been attributed to the biennial rule.

RESPONSE: The commission recognizes there are many factors that influence a person's travel and river recreation plans.

COMMENT 60: One person commented that guides and outfitters work closely together, but they are quite distant when it comes to business. He stated that outfitters have everything to gain in situations like the Beaverhead and Big Hole, while guides are left with big hurdles to jump if they want to move up in the industry. This person stated that any river management that

involves giving future use to those with historical use is debilitating for guides in many ways and in general promotes poor business. This person asked the commission to be aware of this as it moves on with its work.

RESPONSE: Comment noted.

COMMENT 61: One person wrote that the rules should be separate on each river because the rivers are of different sizes and structure.

RESPONSE: There are two sets of rules, one for each river.

COMMENT 62: One person commented that Montana doesn't want logging, mining, or any other industry in the state, and that in their opinion, Montana doesn't want out of state tourism. This person commented that the rivers in Montana are not private rivers, they are public and belong to everyone. He stated that if we are not going to allow tourism in Montana, we might as well close the gates at the border and not let anyone in.

RESPONSE: Comment noted.

COMMENT 63: One organization commented that loosening the regulations would result in increased levels of angler use and greater impacts on the already depressed fish populations, particularly during the current drought. This organization thought that there is ample justification to continue the current modest rules.

RESPONSE: Comment noted.

COMMENT 64: Some people recommended that the commission review the rules in ten years, not five. Some people recommended that the rules be in effect all year long. Others recommended shortening the time period the rules are in effect.

RESPONSE: The commission will review the rules within five years, which is the time period recommended by the CAC. This is a compromise between people who would like the commission to review the rules sooner and those who would like the rules to stay in place indefinitely without any review. As for when the rules are in effect, some people argue that the effect period should be shortened and others argue that the rules should be in effect year-round. The CAC did not recommend changing the date and the commission concurred.

COMMENT 65: One person wrote to express his thoughts about the use of petitions. This individual believes that many people who sign petitions don't have a clue about what they are signing. He would like a petition to count as only one vote. This person thought that if the person doesn't want to take the time to contact the commission or department, he/she should not be listened to.

RESPONSE: Typically the commission considers all forms of public comments without bias toward one form or another. The commission's final decision is not based on the number of comments or "votes" for a particular viewpoint or action.

COMMENT 66: One person commented that the commission needs to reestablish a true planning committee and get down to the root of the problems and try to solve them permanently so that the same mistakes are not repeated on the Beaverhead and Big Hole and on other rivers around the state.

RESPONSE: ARM 12.11.207 and 12.11.212 require the commission to reevaluate the rules within five years. At that time the commission can assess the effectiveness of the rules and determine whether additional actions are necessary.

14. Comments on Beaverhead River Rules

Some people provided specific comments on the rules pertaining to the Beaverhead River.

COMMENT 67: Some people and organizations commented that they support the proposal to open the Tash Bridge to Selway Bridge section of the Beaverhead River to float outfitting (one boat per day). They pointed out that the Beaverhead County Resource Use Plan says, "Strike a balance between the commercial (guides and outfitters) and recreational anglers." They believe that closing the Tash to Selway section completely to commercial use does not strike a balance, and instead it does just the opposite. They pointed out that the plan also says to "Encourage the designation of a section of the Beaverhead River for the exclusive use and enjoyment of the unguided and unfitted public." According to these people the Saturday and Sunday closure on the upper river does just that. They commented that nowhere in the Plan does it say this section should be closed to commercial use every day, it recommends striking a balance.

RESPONSE: The commission assessed all of the information and determined that the restriction on float outfitting on the Tash to Selway section of the Beaverhead struck a balance. The restriction does provide an opportunity for people who want to recreate in the absence of float outfitting. The restriction also allows outfitters to conduct wade trips on this section of the river, and, therefore, the rule does not close this section to outfitting every day.

COMMENT 68: One person commented that the CAC voted 9 to 1 to open the Tash to Selway section to float outfitting. He commented that this was the recommendation of the committee, and it should carry forward in a new rule. If it does not, this person believes that the future of any consensus planning concerning Fish, Wildlife and Parks matters will be seriously jeopardized.

RESPONSE: A decision-making body like the commission is vulnerable to criticism any time it deviates from the recommendations of a CAC. This is why at the beginning of the Beaverhead and Big Hole CAC process the committee was reminded that the commission would make its final decision based on the recommendations of the committee, public comments, and input from the department. By law, the commission cannot assign its decision-making authority to an advisory committee. The commission carefully considered the Beaverhead and Big Hole CAC's recommendation to open the Tash to Selway section to float outfitting. The commission also took into account the Beaverhead County Resource Use Plan, the large volume of comments

from the public requesting that the rule stay the same on this section of the Beaverhead River, and the status of the fishery.

COMMENT 69: One person recommended opening Tash to Selway to float outfitting on Saturdays. This would help spread traffic.

RESPONSE: The commission determined that retaining the existing restriction is a reasonable solution that strikes a balance among the various users of the river.

COMMENT 70: One person noted that the float outfitting restriction on the Tash to Selway reach has resulted in more pressure than before the rule was in place. According to this person, because of the restriction, as well as the nature of outfitting, there are two ranches on that stretch of the river that are currently doing a lease-rod fee type of operation where they have clients come in, and through an outfitter, the clients pay a rod fee to access the river through the private land. According to this person, the restriction has created an exclusive opportunity to sell and this commenter now sees more commercial wade fishing on that stretch of the river than ever before. The pressure of increased commercial wade fishing is compounded by more float fishing by residents. This person talked to residents in Dillon who said they never floated that section of the river before the restriction and now they float that section all the time.

RESPONSE: Comment noted.

COMMENT 71: One person commented that it is important that the function of the rules is clear, and that there is a distinction between rules that address a social issue and rules that address the health of the fishery. This person has observed that issues often become mixed together. According to this person, the closure of the Tash to Selway section on the Beaverhead is an example of a social desire: there is a group of people there who say they want to be able to recreate in that area without competition from outfitters. This person commented that this is very different from saying that the rules are necessary to protect the health of the fishery between Tash and Selway, and therefore the rules restrict a small segment of the pie represented by outfitters in the hope that by restricting them, the health of the fishery will be preserved. This person commented that he wants to highlight that if the commission is addressing a social issue with a rule, that it's addressing the social purpose: lets not blend it and think the commission is addressing the health of the fishery.

RESPONSE: When first adopted, the Beaverhead and Big Hole rules were directed at social issues and the status of the fishery was not a prominent factor. After several years of drought and associated impacts to the fishery, the commission must also consider angling pressure when contemplating the river rules. The decision to retain the prohibition on float outfitting on the Tash Bridge to Selway Bridge section of the Beaverhead was made after consideration of the Beaverhead County Resource Use Plan, public comments, and the status of the fishery.

COMMENT 72: Some people commented that they want to guard against making rules because the commission or department is envisioning unrealistic worst-case scenarios. The environmental assessment says that theoretically, if the prohibition on float outfitting on the Tash to Selway section of the river was lifted, all 84 outfitters could launch a boat there. One person

commented that it is fantastic to think that anything close to this worst-case scenario would happen. This person stated that it is highly unlikely that 10-12 people would want to launch at the same time. According to this person, talking about worst-case scenarios draws attention away from the realistic things that can happen in a situation. Another person commented that he is tired of the worst-case scenario numbers that could not realistically happen.

RESPONSE: The department's environmental assessment said that, "in theory, there could be eighty-four boats launched if every authorized outfitter launched one boat on this reach at the same time and place." The department then predicted that, "in reality, this situation would probably not occur." The environmental assessment was intended to provide a thorough and objective analysis and did not focus on worst-case scenarios.

COMMENT 73: One person commented that outside of any rules governing human behavior, there's something to be said for self-governance. This person thought that people, after seeing the realities of a situation, are going to self regulate and adjust their behavior. This person illustrated his point with the following example: if anglers see five vehicles parked at the Tash Bridge, they are probably not going to fish there because they would realize the area already has the maximum number of anglers.

RESPONSE: Comment noted.

COMMENT 74: Some people and organizations commented that they want the commission to retain the restriction on float outfitting from Tash Bridge to Selway Bridge on the Beaverhead River. One person wrote that biological data was not used to evaluate the proposal to allow float outfitting on this section of the river and commented that this section of river has done better than other sections during the past 4 years of drought. According to this person, this circumstance supports keeping Tash to Selway closed to float outfitting and supports the preferred alternative.

RESPONSE: The department's environmental analysis on the proposed rules, including the proposal to allow outfitters to launch one boat per day on the section of the Beaverhead River from Tash Bridge to Selway Bridge, assessed potential impacts to the fishery. The department predicted that negative effects of increasing pressure on declining trout populations in the Barretts to Selway Bridge reach would be moderate due to the potential of the reach to suffer low flows and high water temperatures during the spring and summer, the potential for an increase in outfitted use, the lack of a winter angling closure, and the current condition of trout populations which had avoided drought based declines until the past two years. The primary reason for the commission's decision to retain the prohibition on float outfitting on this section of the river was based on consideration of the Beaverhead County Resource Use Plan, which includes an objective to "Encourage the designation of a section of the Beaverhead River for the exclusive use and enjoyment of the unguided and unoutfitted public." The commission's decision was influenced to a lesser degree by the condition of the fishery in this section of the river due to ongoing drought conditions and a concern that an increase in angling pressure could be detrimental to fish populations. The commission also took into account the popularity of the restriction on float outfitting on this reach of the Beaverhead River, as indicated in the large number of public comments requesting that this restriction be continued.

COMMENT 75: One person wrote that private anglers in the Dillon area wish to maintain the old reaches including the closure on the reach through town. He believes this makes sense, as management for local residents should take priority on a community reach of the river. He commented that this is particularly important if the department wishes to encourage children to partake in the great sport of angling.

RESPONSE: Comment noted.

COMMENT 76: Another person observed that the Tash to Selway section of the Beaverhead River is very accessible for the residents of the area and offers a relatively high quality (not crowded) walk-in fishing experience from the state-owned property on Poindexter Slough.

RESPONSE: Comment noted.

COMMENT 77: One organization commented that it believes that resident sportsmen and women were rapidly losing access to some of Montana's highest valued public resources, the Beaverhead and Big Hole rivers, before the biennial rule restricted nonresident and commercial use on these rivers. The organization noted that those rules were enthusiastically supported and encouraged through two renewal processes and that the existence of a stretch of river where non-commercial use can take place without impact from commercial venues had high value then and continues to have elevated value for Montana's anglers. The organization asked that the stretch from Tash Bridge to Selway Bridge on the Beaverhead and the stretch from Notch Bottom Fishing Access Site (FAS) to High Bridge FAS be retained for non-commercial angling opportunities.

RESPONSE: The commission decision to retain the restriction on float outfitting from Tash Bridge to Selway Bridge was influenced by the objectives of the Beaverhead County Resource Use Plan. The commission received some comments opposed to removing the restriction on float outfitting on the Notch Bottom to High Bridge section of the Big Hole River. The commission took into account the fact that the CAC recommended eliminating this restriction and noted that there shouldn't be a significant increase in float outfitting on this section.

COMMENT 78: One person wrote that Montana residents have been pushed off the upper Beaverhead River because of crowding and conflict and that they deserve a day on the river in a section closed to float outfitting. This individual noted that residents live here, pay taxes, support local businesses all year long, and support their communities.

RESPONSE: Comment noted.

COMMENT 79: One person commented that he is in favor of the restriction on float outfitting on the Tash to Selway section of the Beaverhead, but this individual thinks the restriction has some problems that should be corrected. According to this person, by closing that section to float outfitting, that part of the river is now advertised as a private, special area where outfitters can take their clients wade-fishing. This person has observed as many as five different outfitters on a single day, really hammering out all the runs. This person is also concerned about the use

of kick boats in this section of the river clogging the up area. According to this person, most of the Beaverhead gets filled up with kick boats and nobody has really addressed that situation. This person recommended that the Beaverhead rules need to be like the Big Hole rules where regulations limit launches to one craft, one launch per day on a section of river. He would like to see kick boats eliminated from the Beaverhead, and if not eliminated, regulated in some way.

RESPONSE: The commission will reevaluate the rules within five years and can assess the wade angling use on the Beaverhead River. Thus far there have not been many complaints about the amount of wade angling occurring on the Tash Bridge to Selway Bridge section of the Beaverhead. The department considers an oar or paddle propelled pontoon boat to be a vessel, or boat. Therefore, the float and launch restrictions for the Beaverhead and Big Hole apply to these types of craft. The commission decided that it was not necessary to implement a general launch restriction on the Beaverhead River at this time. The commission could consider this issue the next time it evaluates the rules.

COMMENT 80: Some people provided comments on the Henneberry to Pipe Organ section of the Beaverhead River. The Beaverhead and Big Hole Outfitter and Guide Association recommended that the commission should stay true to the findings of the CAC and decide to drop the Sunday closure on the Henneberry to Pipe Organ section and open up the Tash section to one boat outfitting on Wednesday, Thursday, and Friday, while leaving the Tash section closed to float outfitting on Saturday, Sunday, Monday, and Tuesday.

RESPONSE: The CAC did not recommend that the commission drop the Sunday closure on the Henneberry to Pipe Organ section. The committee did recommend that the commission remove the restriction on float outfitting from Tash Bridge to Selway Bridge on the Beaverhead River and allow outfitters to operate one boat per day on this reach. The decision to retain this restriction was largely due to the objectives stated in the Beaverhead County Resource Use Plan and the public comments. The commission also took into consideration the status of the fisheries in this reach of the river.

COMMENT 81: One person wrote that Henneberry to Pipe Organ is an important stretch to spread traffic, and he recommended that the commission remove the Sunday closure.

RESPONSE: The restrictions that apply to the Henneberry to Pipe Organ section of the Beaverhead River help to alleviate social conflicts on this popular section of the river.

COMMENT 82: According to one person, the only section of the Beaverhead River that statistically shows there actually was a crowding problem was the section from High Bridge to Henneberry, and the only section that showed there was a high percentage of outfitted use was from High Bridge to Henneberry. This person commented that the rules have compounded the use on this section due to the closure of Henneberry to Pipe Organ on Sundays and the float outfitting closure in the section from Tash to Selway.

RESPONSE: Not everyone agrees that the High Bridge to Henneberry section of the Beaverhead was the only place where there was a crowding problem. The restrictions on other sections of the river help to address overall concerns about crowding on the river.

COMMENT 83: One person commented on the relationship between irrigation and angling interests, stating that before the Clark Canyon Reservoir was created (1963), there were periods of time when there wasn't enough water in the Beaverhead to run from one puddle to another. According to this person, there were serious consequences to the fisheries as a result of low water, not to mention the adverse effect this had on those who were dependent on that water for irrigation. This person commented that irrigation and angling can be compatible and don't need to be competing uses. He recommended that irrigators and recreators work this out together, during drought years. This individual believes that people can address user conflicts much more effectively working together in a collaborative way, rather than working against each other in a combative way.

RESPONSE: Comment noted.

15. Comments on Big Hole River Rules

COMMENT 84: Some people provided specific comments on the rules pertaining to the Big Hole River. One person in favor of the restrictions on the Big Hole wrote that the best impact the department has made in recent years was to close a different section of the Big Hole River on a given day of the week, to let the average guy have a day on the river without stepping from boat to boat of the outfitters.

RESPONSE: Comment noted.

COMMENT 85: A person opposed to the Big Hole restrictions wrote that the rules are in effect for just one reason on the Big Hole: that is to have a private river for the people who dislike outfitters. This person commented that outfitter use is about 10% of overall angler's use on the Big Hole River, and that the hours of commercial use on the Big Hole are from 9:00 a.m. to 4:00 p.m., whereas most of the resident fishing takes place in the early morning or the late evening.

RESPONSE: According to records maintained by the Board of Outfitters, there are 122 outfitters licensed to conduct use on the Big Hole River. Outfitters are allocated 4,678 client days for the time period June 1 to July 31. These figures illustrate that the Big Hole River is not managed as a private river for those people who dislike outfitters. As for the time of day when people use the river, it is an oversimplification to state that all outfitters use the river from 9:00 a.m. to 4:00 p.m., and that most of the non-guided public fishes before or after these times. However, awareness of general patterns of use can help people decide when to visit the river.

COMMENT 86: According to one person, the only time the Big Hole River is crowded is in June during the salmon fly hatch.

RESPONSE: The commission hears from people who believe the crowding problem on the Big Hole River only occurs during the salmon fly hatch and thus the rules should only apply during this time period. The commission also hears from people who believe the rules are needed year-

round. The CAC that evaluated the rules did not recommend changing the effect time period, and the commission concurred with this recommendation.

COMMENT 87: Another person wrote that one of the unforeseen results of this rule is that it has created pressure where there wasn't pressure before the rules. He commented that during the salmon fly hatch, if the epicenter of the hatch is somewhere in the canyon on the day the canyon is closed, everyone is going to be above it. According to this person, anglers can go to Jerry Creek Bridge some days and cars are four deep off the side of the highway. This person believes this situation is a direct result of having the stretch from Jerry Creek down closed that day.

RESPONSE: The commission decided to adopt the proposed changes to the reach restrictions on the Big Hole River. The decision is consistent with the recommendations of the CAC. The changes should allow more flexibility for float outfitting, retain opportunities for non-guided users, and alleviate some of the congestion that occurs during the salmon fly hatch.

COMMENT 88: Some people commented on the proposal to restrict float outfitting seven days a week on the Big Hole River from its headwaters to Mudd Creek. One person wrote that closing the upper portion of the Big Hole to float outfitting is a crock, as no one floats it in the first place due to fences, access points, and low water flows. Another person commented that closing the Big Hole River to float outfitting from the river's headwaters to Mudd Creek FAS is necessary to reduce fishing pressure, especially during years of drought and low-flow regimes. This person thought this restriction would preserve the unique fluvial grayling populations in the headwater reaches of the Big Hole.

RESPONSE: The decision to restrict float outfitting on the Big Hole River from its headwaters to the Mudd Creek Bridge Fishing Access Site was based on the recommendations of the CAC. Closing this section of the river should not have a significant impact on the outfitters but would provide an opportunity for those people who want to recreate on the river without additional pressure from outfitted float trips. Although the potential decrease in angling pressure on this reach of the river might not be significant and the closure is largely for social reasons, fluvial grayling populations are found in this reach, and the commission and the department carefully consider all management actions that might impact grayling.

COMMENT 89: Some people commented that they are opposed to the proposal to eliminate the restriction on float outfitting from Notch Bottom FAS to High Bridge FAS on the Big Hole River. They opposed this proposal due to concern about potential impacts to the fishery from increased angling pressure. Other people commented that they support the proposal to eliminate the restriction on float outfitting from Notch Bottom FAS to High Bridge FAS on the Big Hole. These individuals thought that eliminating this restriction would allow more flexibility for outfitters and that there would be minimal impact other users of the river.

RESPONSE: The commission decided to repeal the Wednesday closure on float outfitting on the Notch Bottom to High Bridge section of the Big Hole River. The decision is consistent with the CAC's recommendation. The commission took into account the status of the fisheries in this reach of the river and concerns about potential impacts due to increased angling pressure. The commission concluded that eliminating the closure on float outfitting for this reach of the river would only result in one additional day of opportunity each week for float outfitting and that the potential increase in use would not have a significant impact on the fishery and other users of the river.

IV. Final Decision

D. Commission's Rulemaking Decision

On May 12, 2005, the commission adopted the Department's preferred alternative (C) with some modifications. The modifications were based on review of the public comments (changes noted in the following section).

E. Department's Environmental Assessment Decision

Based on the analysis in the EA, consideration of the public comments, and consultation with the commission, the department's decision is to implement the preferred alternative with some modifications to ensure consistency with the commission's final rulemaking decision. The modifications to the preferred alternative include:

- One-boat outfitters will be allowed to operate more than one boat on other rivers in the state. This provision should increase the business viability of the outfitter's applying for one-boat status on the Beaverhead or Big Hole.
- The rules clarify that the leasing, selling, or renting of client days on the Beaverhead and Big Hole rivers is prohibited. This was the original intent of the Beaverhead and Big Hole rules and the commission added language to emphasize this fact.
- The rules clarify that if an outfitter's license has lapsed they are no longer authorized to conduct use on the Beaverhead or Big Hole rivers and their client days will be allocated to the temporary client day pool.
- The determination of "zero use" by outfitters will be based on the annual records submitted to the Board of Outfitters, rather than the client day records as originally proposed. Auditing the annual records is a simpler task than auditing the client day records.
- The remainder of the preferred alternative will stay the same.

Based on the analysis in the EA and the applicable laws, regulations and policies, the department determined that this action would not have a significant effect on the natural or human environment. Therefore, the EA is the appropriate level of review and an environmental impact statement will not be prepared. It is my decision to implement the preferred alternative as amended in this decision.

By notification of this decision, the Draft EA is hereby made the Final EA as modified in the Decision Notice. The Final EA may be viewed at or obtained from Montana Fish, Wildlife and Parks at 1400 S 19th Avenue, Bozeman, MT 59718 or www.fwp.mt.gov/publicnotices.

Patrick J. Flowers
Region 3 Supervisor